

# A civil-legal understanding of attacks on journalism

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[Schwerpunkt zum Schutz journalistischer Arbeit im europäischen Rechtsraum](#)



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By

Amongst the many aspects of jurisprudence, legal practice and the extant range of institutional forms the law occupies, there is the often overlooked sociological fact that the law is (amongst these many other things) a civil institution concerned with regulating and protecting civil and associative life. And whilst the former is well understood, the latter is usually understood by social scientists in terms of *‘a coercive form of technical regulation’* that responds to *‘demands for functional efficiency, market predictability, and authoritative control’* (Alexander, [2006](#): 152). As such, the civil role of law – the way that it *‘translates’* and *‘reconstructs’* struggles over political and economic power, in terms of basic civil values – is usually neglected when it comes to considering attacks on another primary civil institution – journalism.

## Looking beyond human rights: attacks on journalists and journalism as a form of ‘civil diminishment’

The usual form of understanding the relationship between law and attacks on journalism is via how human rights standards provide an authoritative framework with universalising ambitions to safeguard journalistic practice and sanction infringements of fundamental rights. And not how state and market power when arranged against the practice of free and independent journalism can be legally resisted through an assertion of basic solidarising civil values (what Alexander, 2006: 154 calls legal *‘counter power’*). In essence, it is the potential of the law through its *‘commitment to rules that allow solidarity and autonomy’* to offer civil resistance to the non-civil forces of state and market power that I am concerned with. And to put that dramatically it is the charge that state and market forces arranged (in

whatever form) against free and independent journalism constitutes a form of civil diminishment that need to be redressed through law.

This is not to trivialise nor fail to recognise that when the conditions necessary for the safe undertaking of journalism are compromised the consequences are ultimately and acutely felt by the journalist who might be targeted directly and personally, or indirectly through attacks and threats directed at colleagues, sources or family members. Nor is it to suggest that the manifestation of such threats and attacks against journalists should not be viewed in terms of violations of the fundamental human rights of the journalist or that any such rights based approach is somehow inappropriate. Negatively expressed my point is not that aggressions directed at the person or dignity of an individual journalists do not and should not engage in core human rights provisions such as the right to freedom of expression, rights to life, liberty and security, as well as the prohibition of the use of torture, but that there are other, what we might call societal, considerations that should be made when considering the application of law to redress attacks on journalism that sit alongside matters of human rights. In brief, attacks on journalism, have civil consequences beyond those immediately suffered by the rights-bearing journalist. Which only leads to a further caveat. These civil consequences are not best understood in terms of the usual litany about journalism having a democratic and public sentiment formation role in political and democratic deliberation but should be viewed as part of a process of civil diminishment. Again the point here is not that such litanies are inappropriate, but that they do not go far enough in terms of understanding the meaning and significance of the process of civil diminishment that attacks on journalists and journalism ultimately represents and which should be understood in the form of a basic 'constitutional infringement' or as an infringement against '*the general principles of law recognized by civilized nations*' (compare Article 38(1) of the [ICJ Statute](#)).

## **The effects on citizens' participation in collective civil life**

What I mean here is that to attack journalism should be judged at the meta level of whether such attacks constitute an infringement on the principles of basic law where those principles refer to the communicative basis of our collective life. As Harrison (2019) puts it '*common civil interests are constitutive of the fundamental issues that define our version of civility and these are best understood as invariant civil concerns*'. The fact then that these invariant civil concerns '*are unchanging and ever-present in all civil societies (...) consistently held as simultaneous concerns by diverse civil associative groups and form the basis of the pluralism we take for granted in a modern civil society*' points to the need to take into account the universal aspects of the quality and communicative basis of associative life. That is beyond narrow political-democratic considerations, and to consider the role of journalism in relation to the communicative basis of civil association more broadly. The question at issue here then is not so much about rights and democracy but rather centres on how attacks on journalism are interlinked with potentially detrimental consequences for communicative and associative public life *per se*. In other words, to perceive journalism as influencing the quality of civil life (its normative core) is to emphasise the extent to which the participatory capabilities of

citizens are understood in relation not just to traditional sites of political participation, but more inclusively in relation to the capabilities of citizens to voluntarily participate in collective civil life.

## The impact on the communicative base of the civil sphere

To put the matter another way, the civil role of journalism facilitates *‘the idea of self-government by communication’* (Calhoun 2011: 313). For Calhoun this conception *‘rests on three core claims: first, that there are matters of concern important to all citizens and to the organization of their lives together; second, that through dialogue, debate, and cultural creativity, citizens might identify good approaches to these matters of public concern; and third, that states and other powerful organizations might be organized to serve the collective interests of ordinary people—the public—rather than state power as such, purely traditional values, or the personal interests of rulers and elites’* (ibid., 311). In other words the communicative circumstances and conditions under which solidarising and democratic discourse takes place in the civil sphere are determined by how free and independent the institutions of communication in general and journalism in particular are to contribute to what Alexander referred to above as *‘a realm of structured, socially established consciousness, a network of understandings creating structures of feeling that permeate social life’* (Alexander, 2006: 54). For such a realm to endure is dependent on the aspirations of the communicative base of the civil sphere and within that the freedom journalism has to fulfil its civil role in contributing to the quality and nature of this civil realm of consciousness, understandings and feelings. As such to attack journalism is to occasion the civil diminishment of social life manifest as assaults on constitutional settlements, basic law, or the principles of the general laws of civilised societies.

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